



FINDINGS OF FACT

1. The Somersworth School Board is a "public employer" within the meaning of RSA 273-A:1 X.
2. The Somersworth Association of Educators is the duly certified bargaining agent for teachers and other professional employees of the Board. The three tenured teachers who were non-renewed were members of the bargaining unit.
3. The Association and the Board are parties to a CBA for the period July 1, 1992 through June 30, 1994. Three articles of the CBA are pertinent to these proceedings. They are Article IV A 1 which defines "grievance," Article VI relative to election or termination of contract, and Article XIII pertaining to reductions in force (RIF). They read, in pertinent part, as follows:

## IV. GRIEVANCE PROCEDURE

A. Definitions

1. A "grievance" shall mean a complaint by a teacher or by the Association concerning an alleged violation or an alleged inequitable application of any of the provisions of this Agreement or of written Board policy concerning the terms or conditions of employment, except that the term "grievance" shall not apply to any matter in which the Board has no authority to act.

## VI. ELECTION OR TERMINATION OF CONTRACT

Teachers who are not to be reemployed in the District shall be notified in writing no later than March 30. No teacher shall be non-renewed, suspended, reduced in rank or compensation without a due process hearing before the Board under the guidelines established by appropriate state laws. All information forming the basis for such action shall be made known to the teacher prior to such hearing.

If an administrator has a concern about a teacher's performance, he/she will voice those concerns in

writing to that teacher prior to January 30 so that the teacher will have ample time to remedy the problem before the Board takes any action concerning the non-renewal of that teacher. Such notice shall also contain suggestions for improvement of the areas of concern voiced by the administrator.

The Board decision concerning election to or termination of employment shall be governed by appropriate state law (RSA 189:13 and RSA 189:14-a and 14-b). Board decisions may be appealed to non-binding arbitration with the arbitrator's scope of judicial review limited to providing that the Board decision was arbitrary and/or capricious.

#### XIII. REDUCTION IN FORCE

In the event the Board finds it necessary to reduce the number of teachers in the district, non-tenured teachers will be laid off first. All things being equal, following evaluation, seniority will prevail.

Should conditions require that tenured teachers be laid off, all things being equal, following evaluation, seniority will prevail.

All layoffs shall be in accordance with state laws and within the following classifications: (1) elementary, (2) middle school (by subject area, when appropriate), (3) high school (by subject area), (4) specialists (by area of specialty).

Any teacher laid off because of a reduction in staff shall have a letter placed in his/her personnel file stating that said teacher was not offered a new contract because of reduction in staff. Such information shall also be contained in any request for recommendation. Any teacher affected shall be notified in writing within a week of the vote by the Board. Any teacher so affected shall have the right to appeal to the Board within ten (10) days of said notification and may follow the procedures established by state law (RSA 189:14-a and -b).

When teaching positions become available, within the classification(s) teacher was laid off, laid off teachers shall be reinstated in inverse order to their being laid off if, at the time of their

reinstatement, they are certified. Recall rights shall be listed as follows:

- a. They shall exist for one (1) school year following the school year in which the layoff notice is received, or until a position is refused, whichever comes first.
  - b. The laid off teacher(s) shall maintain an up-to-date record with the school department as to where he/she can be notified of a recall.
  - c. Teachers must accept a recall within ten (10) days after notification or be deemed to have waived such rights.
  - d. Upon return, a recalled teacher shall be placed on their appropriate step on the salary schedule; and all benefits to which the teacher was entitled prior to the RIF, including unused accrued sick leave, will be returned.
4. The three teachers, one of whom has since died, who were non-renewed lost their jobs due to a reduction in force (RIF) under Article XIII of the contract, i.e., they were not the subject of a for cause termination under Article VI of the contract. District pleading No. 3 and Forge testimony. Likewise, these teachers have received no indication of administrative concern about their performance as is contemplated under Article VI, para. 2 of the CBA.
  5. The three teachers who were reduced in force (RIF'd) under Article XIII received notice thereof prior to March 30, 1993. On March 29, 1993 each of them wrote a letter to the Interim Superintendent appealing their non-renewal. Board Exhibit No. 1.
  6. On September 2, 1993, Betty Trott filed a grievance over her being reduced in force. Another grievance covering all three teachers was filed on October 21, 1993. Superintendent Beeler denied the first by explaining that the RIF was based on budget reductions made by the City Council. He denied the second based on timeliness and on its not being arbitrable under the CBA. Board Exhibit No. 3.
  7. During and before the end of September, 1993, the Somersworth School Board heard appeals from the

grievance decisions of the Superintendent. In the course of these hearings, it became apparent that standards or "discriminators" other than seniority were utilized by the Superintendent in determining which teachers would be subject to RIF. The Board affirmed the Superintendent's findings by denying the grievances. In so doing, the Board raised the issue of timeliness and claimed that the use of the grievance procedure was inappropriate for the claims made because of the recitation in Article XIII para 3 of the CBA that teachers "so affected" "may follow the procedures...[of] RSA 189:14 a and b." There is no contract provision relating to the exclusivity of such a remedy. The definition of grievance noted in Finding No. 3, above, suggests exactly the opposite, referencing any "alleged violations or...inequitable application" of the agreement.

8. On October 6, 1993, counsel for NEA-New Hampshire wrote three letters to the Commissioner of Education appealing the RIF of each of the three teachers under RSA 189:14-b. Those appeals have yet to be acted upon by the Department of Education. Board Exhibit No. 2.
9. On December 16, 1993, counsel for NEA-New Hampshire wrote the Chair of the Somersworth School Board informing her that the Association had determined that the three RIFs should be arbitrated. District Exhibit No. 5. Article IV.B.2 of the CBA provides, in pertinent part, that the request for arbitration, as distinguished from the filing of a grievance, "is a waiver of the right of said Association or grievant to submit the underlying dispute to any other administrative or judicial tribunal for resolution." Joint Exhibit No. 1.
10. In 1993, a 1992 RIF was arbitrated between the same parties, involving the same contract provisions and an alleged violation of Article XIII. The issue of a RIF claim not being arbitrable under Article XIII was not raised or asserted in those proceedings.
11. Historically, Article XIII, as it appeared in the 1987-90 CBA, provided for non-binding arbitration of layoff issues and limited the arbitrator's authority to determining whether the Board's action was arbitrary or capricious. Board Exhibit No. 6. These restrictions were removed,

as the result of negotiations, for both the 1990-92 and 1992-94 CBA's where the language is as recited in Finding No. 3, above. Board Exhibit No. 12 and Joint Exhibit No. 1.

12. On February 15, 1994, in the course of negotiations for a CBA to follow the 1992-94 agreement, the Board proposed language to add a "Section G" to Article IV so that RIF actions would be defined as non-grievable as well as changes to the RIF language, standards of comparison, and those situations when seniority would control the selection of teachers subject to RIF. Association Exhibit No. 1.

#### DECISION AND ORDER

Both the bargaining history and the contract language convince us that the parties have agreed, through negotiations, to arbitrate a dispute such as this. For that matter, they have. Finding No. 10. That proceeding, under the same contract language, prompted no objections as to subject matter arbitrability. Pleadings, testimony and exhibits all indicate that the three teachers were subject to RIF under Article XIII, not a "for cause" proceeding under Article VI. Finding No. 4. Thus the broader definition of grievance and the applicability of final and binding arbitration under Article IV.B.3.b apply to this case. That is the bargain the parties have struck for them themselves.

This conclusion is further supported by the bargaining history when non-binding arbitration provisions pertaining to Article XIII were bargaining away for the 1990-92 CBA. We recognize this as a conscious and intended act by the parties in negotiating for their 1990-92 contract. This rationale is supported by the fact that the Board felt it needed to negotiate a change to Article XIII if it wanted to remove or modify the binding nature of arbitration proceedings arising thereunder. Finding No. 12 and Association Exhibit No. 1. Since that removal or modification has yet to occur, the parties remain bound to their agreement to handle RIF grievances through the final and binding arbitration provisions of their CBA.

Given the construction of the CBA, the bargaining history and specificity of the provisions of Articles IV and XIII, we conclude that the processing of a grievance relating to a RIF does involve "the application or interpretation of specific provisions of the CBA" under Appeal of the City of Nashua, 132 N.H. 699 at 706 (1990). Likewise, the facts of this case conspicuously omit any "positive assurance that the arbitration clause [of the CBA] is not susceptible of an interpretation that covers the asserted dispute"

as found in Appeal of Westmoreland School Board., 132 N.H. 103,105 (1989) quoting from Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 582-83 (1960).

The ULP is hereby DISMISSED and the parties are directed to proceed forthwith with the grievance arbitration hearing scheduled for May 10 and 11, 1994.

So ordered.

Signed this 10th day of MAY, 1994.

  
EDWARD J. HASELTINE  
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding. Members Seymour Osman and E. Vincent Hall present and voting.